No. 96-1617 (4)

Supreme Court, U.S.
FILED
JUN 27 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

PUEBLO OF SANTA ANA, PUEBLO OF SAN JUAN, PUEBLO OF TESUQUE, PUEBLO OF ACOMA, PUEBLO OF SANDIA, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, SAN FELIPE GAMING ENTERPRISE BOARD, and PUEBLO OF TAOS,

Petitioners,

v.

JOHN J. KELLY, in his official capacity as United States Attorney for the District of New Mexico; JANET RENO, Attorney General of the United States; BRUCE BABBITT, United States Secretary of the Interior; the UNITED STATES of AMERICA; and the STATE OF NEW MEXICO,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Tenth Circuit

PETITIONERS' REPLY TO BRIEFS OF THE UNITED STATES AND THE STATE OF NEW MEXICO IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Gregory v. Ashcroft, 501 U.S. 452 (1991) 4

New York v. United States, 505 U.S. 144 (1992) 5

Seminole Tribe v. Florida, 116 S.Ct. 1114 (1996) 4

STATE CASES

State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995) 2, 3

DOCKETED CASES

Bartelli v. Graves, No. 97-CV-183 (Shawnee County Dist.Ct., filed February 28, 1997) 3

Sears v. Symington, No. CV97-08942 (Maricopa County Super.Ct., filed May 15, 1997) 3

State ex rel. Coll v. Montoya, No. SF-97-1420 (C) (1st Judic.Dist.Ct., filed June 19, 1997) 4

STATUTES

25 U.S.C. § 2710(d)(7)(B) 5

ARGUMENT

The Brief in Opposition of the State of New Mexico (hereinafter, "the State") demonstrates why this Court should grant review of this case. According to the State, a state or federal court can invalidate the Secretary of the Interior's approval of a tribal-state gaming compact based on some state law defect at any time after the compact has taken effect, no matter how much a tribe has invested in reliance on the compact. Such a determination, the State claims, can be based on novel state law theories that were unknown at the time the compact was entered into, and it can come at the urging of any person who decides to sue, whether or not the tribe is a party to the case.

That view – the view adopted by the court below – undermines the security of every tribal-state gaming compact that has been approved since IGRA took effect, and it eviscerates the authority Congress conferred on the Secretary to determine compact validity. Petitioners ("the Tribes") urge that any claim that a compact is void based on an asserted state law defect falls within the Secretary's exclusive statutory authority to consider issues of compact validity, and thus must first be presented to the Secretary. The Secretary's primary jurisdiction over such claims is inherent in the Secretary's explicit authority to approve compacts under IGRA. The United States fully supports that view of the statute.

The Secretary's power to consider claims of compact invalidity is, of course, subject to judicial review. The state courts, moreover, have the ultimate authority to decide issues of state law. But the Secretary must retain

the primary authority to decide whether a belated assertion of some state law defect warrants voiding a compact that has already taken effect under IGRA. The flexibility of an administrative remedy will often be called for. *See, e.g.*, United States Br. at 11 n.10.

In commencing Class III gaming activity, and making the substantial investment such activity necessitates, a Tribe must be able to rely upon the validity of its approved compact. But if, as the State claims here, some subsequently discovered state law defect never raised with the Secretary can render an approved compact void *ab initio*, federal laws may have been violated inadvertently. Huge investments may be at risk, and important tribal commitments may be jeopardized. Congress gave the Secretary exclusive power to determine compact validity, and that power must be preserved here, to enable the Secretary to fashion a reasonable remedy in the face of a claim of invalidity based on state law factors. If a State, or any one of its citizens, can end-run the Secretary's authority by taking such claims directly to the courts, the regularity of the administrative process will be displaced by ad hoc judicial intervention, thoroughly subverting the intent of Congress in the Act.

The State claims, however, that the issue presented here is unique to New Mexico, because compacts differ from state to state, and state laws vary. N.M. Br. at 8-9.[1]

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[1] The State also argues that standing considerations would serve to protect approved compacts from attack, but this claim seems particularly disingenuous. In *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995), the New Mexico Supreme Court decision that declared the New Mexico compacts void

The State is mistaken. The issue presented here has nothing to do with state laws or compact terms, but rather with the primary jurisdiction of the Secretary to determine in the first instance whether such state law issues might affect the validity of an approved compact. That is plainly a federal question, arising directly from the language and structure of IGRA, and it applies across the board to any challenge to any approved compact. The court below resolved that question in a manner that exposes every compact to attack, on whatever state law grounds. Those attacks, moreover, are beginning to multiply.[2] Millions of dollars in tribal investments, many millions more in tribal services and programs, tens of

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because of the Governor's lack of authority, the court held that *anyone* had standing to bring an action such as that one, as long as the issues raised were of sufficient "public importance." Pet. App. at 99a-100a. Pending challenges to the validity of compacts entered into in Arizona and Kansas have also been brought by private parties, on similar theories. *See* n.2, *infra*.

[2] As predicted in the Tribes' original Petition, at 10, the parties who unsuccessfully asked the Arizona Supreme Court to entertain their attack on the validity of the 16 approved Arizona compacts have renewed their attack in an action recently filed in Arizona Superior Court. *Sears v. Symington*, No. CV97-08942 (Maricopa County Super.Ct., filed May 15, 1997). The petitioners in that case claim that Arizona's constitution prevents even the legislature from approving the tribal gaming compacts in effect in Arizona, and in a brief submitted with their complaint the petitioners rely largely on the decision below and *Clark*, arguing that the compacts can be declared illegal by a state court based on state law doctrines. Meanwhile, the challenge to the approved Kansas compacts is proceeding, like the Arizona case, and like *Clark*, without joinder of the affected Tribes as parties. *Bartelli v. Graves*, No. 97-CV-183 (Shawnee County Dist.Ct., filed February 28, 1997). Finally, just before this brief was filed, gaming opponents in New Mexico

thousands of jobs, and the economic futures of tribes and their members, are now in jeopardy. This is clearly an issue of national importance.

The State errs in claiming that State power would be undermined by recognizing the Secretary's authority to determine the validity of a compact. Unlike *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which involved congressional restraints on State power in an area "of the most fundamental sort for a sovereign entity," *id.* at 460, enforcing the Secretary's primary jurisdiction to consider challenges to approved compacts does not interfere with any inherent, traditional or fundamental State power. Rather, it is fully consistent with Congress's plenary, supreme, and exclusive constitutional authority to regulate tribal affairs within Indian country. *Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1124, 1126 (1996). While Congress invited the States to become involved in the regulation of tribal gaming in IGRA, it surely retained the discretion to vest the Secretary with conclusive authority to determine whether a compact between a State and a Tribe has been

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launched a new state court attack on compacts that would be signed under the legislation passed by the 1997 New Mexico legislature. *State ex rel. Coll v. Montoya*, No. SF-97-1420(C) (1st Judic.Dist.Ct., filed June 19, 1997). The plaintiffs claim that this legislatively approved compact violates the New Mexico constitution in various respects, and also that it violates IGRA, and they urge that the state court should decide these questions, *not* the Secretary. Under *Clark* and the decision below, the state court's decision in this case, even on federal law issues, could void these compacts, regardless of secretarial approval, and lead to a gaggle of conflicting state court rulings on critical federal law issues.

executed in accordance with the requirements of the Act, and should thus be put into effect.

Nor does the Secretary's power under IGRA to give effect to a sufficient manifestation of State assent to a compact run afoul of the Tenth Amendment considerations articulated in *New York v. United States*, 505 U.S. 144 (1992). Congress has not forced the State to agree to a compact with the Tribes, and IGRA carefully preserves the State's right to refuse to agree to a compact under any circumstances. 25 U.S.C. § 2710(d)(7)(B). The Governor's execution of these compacts, moreover, was an open, public, voluntary action of a state official, and indeed, was in express fulfillment of a campaign commitment.

In *New York*, this Court held that the power of federal courts to interpret and enforce against the States otherwise valid federal laws in no way invades any Tenth Amendment power of the States. *Id.* at 178-179. Here, similarly, the question whether a governor's assent to a compact sufficiently manifests the concurrence of the State, absent any extant governing determination that the Governor lacks such authority, is one of interpretation of IGRA. The act of statutory interpretation itself can in no way amount to an imposition on some reserved power of the State.

The United States fully agrees with the Tribes that the court of appeals erred in holding that the Tribes' compacts are invalid, and it shares the Tribes' concern that that decision "may encourage 'collateral attacks' " on approved compacts. United States Br. at 13. Nonetheless, while acknowledging the need to prevent "one party to a

compact from exercising unilateral power over the compact's status," and to promote "certainty and consistency" in tribal gaming, *id.* at 13, the United States argues that the decision below was correct on a ground not reached by any court below, that the tribes' gaming activities are nevertheless not "permitted" by the State. *Id.* at 13-14. *See* Petition at 6 n.4. Aside from the inherent contradiction in the claim that even though the State has assented to compacts that expressly authorize casino-style gaming, it does not "permit" such gaming, the claim is refuted by the legislation enacted by the 1997 New Mexico legislature, discussed in the very next paragraph of the United States' brief. United States Br. at 14. That legislation expressly authorizes compacts permitting all of the forms of gaming allowed under the 1995 compacts at issue here, albeit under Draconian regulatory and financial requirements and restrictions. *See* Petition at 20 n.13. It also allows slot machines to be operated at racetracks and certain private clubs in the State. The United States' claim of illegality, thus, if it ever had any merit, has been thoroughly obviated by this legislation.[3]

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[3] The United States also complains that since there is no conflict among the circuits on the issue raised here, this case is not appropriate for review. This point reflects a misunderstanding of the concern here. The cases that have already arisen, and that are poised to arise in the future, are *state* court decisions deciding federal law questions of compact validity (but often under the guise of state constitutional questions, thus precluding review in this Court), and preempting secretarial authority over those issues. Several such cases are cited and discussed in the Tribes' Petition at 8-9 n.5. There are also conflicting federal court decisions, that the Tribes also noted. *Id.* at 8-9 n.5. The circumstances that led this case to

Especially given the onslaught of state court challenges to approved compacts that is already underway, *see supra* at n.2, this Court's intervention is needed now, to preserve the federal administrative authority intended by Congress to govern determinations of compact validity, and to restore some security and certainty to the reliance interests of tribes that have undertaken Class III gaming activities on the basis of approved compacts.

CONCLUSION

For the reasons stated, this Court is respectfully urged to grant the writ and to review the opinion and order of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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June 27, 1997

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be filed in federal court were unusual, and may not be repeated. In short, given the nature of the issue presented, waiting for additional federal court of appeals decisions before this Court undertakes consideration of the issue merely invites more state court attacks on approved compacts.

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